Court of Queen's Bench of Alberta

Citation: Khadr v Warden of Bowden Institution, 2019 ABQB 207

Date:
Docket: 150056836X1
Registry: Edmonton

Between:

Omar Ahmed Khadr

Applicant

- and -

Dave Pelham, Warden of the Bowden Institution and Her Majesty the Queen

Respondents

Reasons for Decision
of the
Honourable Chief Justice
Mary T. Moreau

I. Executive Summary

[1] At issue in this application under s 94 of the *Youth Criminal Justice Act,* SC 2002, c 1 *(YCJA)* is whether the nearly four years the Applicant, Omar Khadr, spent out of custody on judicial interim release, subject to conditions that essentially mirror those of conditional supervision, should be credited towards the conditional supervision portion of the eight-year sentence of confinement imposed on him by the Convening Authority for United States Military Commissions.

[2] Mr. Khadr applies under s 94 of the *YCJA* for a review of the eight-year sentence, and is seeking an order placing him under conditional supervision for one day, following which his sentence would expire. The Alberta Crown Prosecutorial Service (ACPS) and the Attorney General of Canada (AG Canada) agree that no further custodial time is required for Mr. Khadr, but they oppose his release from custody on conditional supervision for only one day. Mr. Khadr

has served 1650 days (4 ½ years) of his sentence in custody, leaving 1272 days (3 ½ years) to be served under conditional supervision. The AG Can argues that while the time Mr. Khadr has spent under various conditions could factor into the nature of the conditions placed upon him during the remaining period of conditional supervision, it cannot be used to reduce or otherwise alter his sentence.

[3] A preliminary issue arises as to whether a review under s 94 of *YCJA* contravenes s 5 of the *International Transfer of Offenders Act*, SC 2004, c 21 [*ITOA*]. The parties agreed it does not, but I have considered the issue for the sake of completeness and context. Section 5 provides that "[t]he verdict and the sentence, if any, are not subject to any appeal or other form of review in Canada." A review under s 94 of *YCJA*, however, is about the young person's progress since being incarcerated and does not involve a review of the trial process for error. I accept that s 94 of the *YCJA* authorizes a proceeding related to the completion and carrying out of sentences.

[4] I find that Mr. Khadr has raised appropriate grounds for review under s. 94(6), including the unique circumstances of his case. What remains to be determined is the appropriate period of conditional supervision. Under s 94(19)(b), I may release the young person subject to the appropriate conditional supervision, modified as necessary to meet the particular circumstances, and keeping in mind that the conditional supervision cannot exceed the remainder of the youth sentence.

[5] Case authorities confirm that pre-sentence credit can be granted for restrictions other than custody, including driving prohibitions and bail restrictions: ***R v Wust***, [2000] 1 SCR 455 at para 9; ***R v McDonald***, (1998) 40 OR (3d) 641 (ONCA) at 659; ***R v. Wooff*** (1973), 14 CCC (2d) 396 (ONCA) at 398 (in dissent); ***R v Lacasse***, 2015 SCC 64; ***R v Lau,*** 2004 ABCA 408; ***R v Newman,*** 2005 ABCA 249; ***R v Ewanchuk***, 2002 ABCA 95. Moreover, where the sentence and the pre-sentence restriction are the same or similar, the pre-sentence restriction can be deducted from the sentence. Interpreting theses cases within the framework of s. 94(19) and the objects of the *YCJA,* I conclude that the youth justice court, as part of its s. 94 review function, should consider the substance of the restrictions imposed on a young person as comprising part of the punishment or sentence in order to determine the length of time the young person will be subject to release on conditional supervision.

[6] I find that paragraph 1 of the interim release order granted by Ross J. in May 2015, which provides that the sentence does not run while on judicial interim release, does not prevent me from considering the impact of Mr. Khadr's bail conditions on a subsequent s 94 *YCJA* review. Like the statutory mandatory minimum provisions and the provision that a sentence cannot begin to run until imposed, the bail order must be considered in context. That context is now framed by s. 94 of the *YCJA*.

[7] While s. 94 of the *YCJA* does not expressly provide authority to credit time under interim release to conditional supervision, Mr. Khadr has been subject to restrictions that coincide with those of conditional supervision since May 2015, a period of close to 4 years. Keeping in mind the *YCJA* principles emphasizing that young persons are entitled to both timely and prompt intervention and to effective rehabilitation and reintegration, I credit Mr. Khadr for the time spent under the bail conditions that have essentially mirrored the mandatory conditions set out in s 105 of the *YCJA* governing conditional supervision orders.

[8] As a result, I order that Mr. Khadr be placed on conditional supervision for one day, which I consider to have been served. His eight-year sentence having been completed, he is no longer bound by Ross J's interim release order.

II. Introduction

[9] Mr. Khadr has been on judicial interim release since May 2015 (almost 4 years) pending the determination of an appeal from his convictions (but not sentence) still pending in the United States. The May 5, 2015 judicial interim release order of Ross J provides:

> Any time during which the Applicant is lawfully at large on judicial interim release pursuant to the Order shall not count as part of any sentence imposed on the Applicant which will be deemed interrupted.

[10] In her most recent review of the conditions of Mr. Khadr's interim release on December 21, 2018, Ross J noted:

> Mr. Khadr's feelings about his indefinite legal status are understandable, but they do not change the fact of that status or the nature of that status. While his appeal remains pending, he remains convicted of very serious offences. He has not served his sentence for these offences. Bail cannot be a replacement for the appeal itself. Bail does not provide an alternative way to serve a sentence. (Transcript of December 21, 2018, 2/36-41).

[11] Mr. Khadr applies under s 94 of the *YCJA* for a review of his sentence, seeking an order that he be placed under conditional supervision for one day, on the basis that the conditions of his judicial interim release essentially mirrored the terms of conditional supervision under s. 105 of the *YCJA*.

[12] The ACPS has no objection to Mr. Khadr being placed under conditional supervision in accordance with the procedure set out in s 105 of the *YCJA* for the remainder of his youth sentence. The ACPS takes the position that the principles of accountability and rehabilitation set out in s 3 of *YCJA* would be served by apportioning Mr. Khadr's sentence as requiring no further period of custody, leaving approximately 3 1/2 years of conditional supervision to complete his sentence.

[13] The AG Can also opposes Mr. Khadr's release from custody under conditional supervision for one day. The AG Can argues that while the time Mr. Khadr has spent under various conditions could factor into the nature of the conditions placed upon him during the remaining period of conditional supervision, it cannot be used to reduce or otherwise alter his sentence. The AG Can further submits that the applicable conditions should mirror those imposed in the most recent review of Mr. Khadr's judicial interim release conditions on December 21, 2018.

III. Background Facts

[14] Mr. Khadr is a Canadian citizen born on September 19, 1986. When he was 15 years old, his father left him with a group of Islamic militants in Ayub Kheyl, in Afghanistan. On July 27, 2002, the militants were engaged by US forces, during the course of which the militants, an American soldier and two Afghani translators were killed. Another American soldier was

seriously wounded. Mr. Khadr was also seriously wounded and was confined at the American Naval base at Guantanamo Bay, Cuba (GTMO).

[15] Eight years later, on October 13, 2010, Mr. Khadr pled guilty to charges of murder and attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying. He did so on assurances he would not receive a sentence longer than eight years and he would be transferred to Canada after one year. In September 2012, he was transferred to Canada from GTMO under the *ITOA* where he spent the next 17 months in a maximum-security federal penitentiary, and a further 16 months in a medium-security penitentiary. He spent, in total, close to 13 years in custody.

[16] As part of the transfer process, s 15 of the *ITOA r*equired the Minister to identify the "equivalent" Canadian offences for which Mr. Khadr had been convicted. Correctional Services Canada (CSC), assuming that the sentence imposed was an adult sentence, determined his full parole eligibility date to be July 1, 2013, his statutory release date to be October 20, 2016, and his warrant expiry date to be October 30, 2018.

[17] Following his transfer to Canada, Mr. Khadr appealed his US convictions to the United States Court of Military Commission Review (the CMCR Appeal) on November 8, 2013, but not his sentence. On March 7, 2014, the CMCR directed that his appeal be held in abeyance pending further order. There has essentially been no progress in Mr. Khadr's CMCR Appeal for reasons that are institutional and in no way attributable to him.

[18] Mr. Khadr filed a *habeas corpus* application in the Court of Queen's Bench of Alberta alleging he should be housed in a provincial correctional facility for adults rather than a federal penitentiary. His application was initially dismissed: ***Khadr v Edmonton Institution,*** 2013 ABQB 611 [***Khadr 2013 ABQB***]. The Alberta Court of Appeal allowed his appeal and determined that his sentence was a youth sentence to be served in a provincial correctional facility for adults: ***Khadr v. Edmonton Institution,*** 2014 ABCA 225 [***Khadr Alta CA***]. The Supreme Court of Canada dismissed the AG Can's appeal on May 14, 2015: ***Bowden Institution v. Khadr,*** 2015 SCC 26 [***Khadr 2015 SCC***].

[19] Mr. Khadr applied for parole on February 16, 2015, prior to the Supreme Court of Canada hearing. His parole application was pending before the Parole Board of Canada when Ross J granted judicial interim release pending the determination of his CMCR Appeal on April 25, 2015, and on May 5, 2015, Ross J set the conditions of his release.

[20] Mr. Khadr points out that at the latest, he would have been entitled to release on conditional supervision on August 19, 2015, about 3 1/2 months after Ross J granted him judicial interim release. His sentence would have expired on October 30, 2018.

[21] Since his judicial interim release in May 2015, Mr. Khadr has abided by all the conditions of his release, and has incurred no breaches as confirmed by the report dated February 15, 2019 of Ms. Kate Car, his bail supervisor. Mr. Khadr has applied on five occasions to relax the terms of his interim release. Ross J gradually relaxed then removed some conditions of his release. His last two variation applications, most recently in December 2018, were largely dismissed.

[22] I have summarized the most relevant events in the chronology below:

- October 2002 – Mr. Khadr was transferred to GTMO where he was held in military detention, without charge, by a Presidential Military Order.
- 2005 – Mr. Khadr was declared an "enemy combatant" and was formally charged.
- 2006 – The United States Supreme Court held that the Presidential Military Order, which established the Military Commissions to try those detained in GTMO, contravened the US *Uniform Code of Military Justice* and the *Geneva Conventions*.
- February 2, 2007 – Mr. Khadr was charged under new legislation with: (1) murder in violation of the law of war; (2) attempted murder in violation of the law of war; (3) conspiracy; (4) providing material support for terrorism; and (5) spying.
- January 9, 2010 – The Supreme Court of Canada concluded in ***Canada (Prime Minister) v. Khadr***, 2010 SCC 3 that Canadian authorities breached Mr. Khadr's s. 7 *Charter* rights during his confinement at GTMO stating (at para 24):

  > Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

- October 13, 2010 – Mr. Khadr pled guilty to all five charges against him on assurances he would not receive a sentence longer than eight years and he would be transferred to Canada after one year. In connection with his guilty plea, he entered into a Stipulation of Facts in which he admitted throwing a grenade that killed one American soldier and injured another, receiving arms training from al-Qaeda, planting improvised explosive devices, and spying on US troop movements. He was sentenced to eight years' confinement.
- May 26, 2011 – The Convening Authority for United States Military Commissions approved the sentence of eight years' confinement.
- September 28, 2012 – Mr. Khadr was transferred from GTMO to Canada and admitted to Millhaven Institution.
- December 13, 2012 –Mr. Khadr was classified as maximum security.
- January 25, 2013 – Mr. Khadr was officially placed at Millhaven Institution, a maximum-security prison.
- April 23, 2013 – Mr. Khadr was voluntarily transferred to Edmonton Institution, a maximum-security prison.
- November 8, 2013 – Mr. Khadr filed his CMCR Appeal; November 14, 2013 – Mr. Khadr was reclassified as medium-security.
- February 7, 2014 – Mr. Khadr was transferred to Bowden Institution, a medium-security prison.
- March 7, 2014 – the CMCR directed that Mr. Khadr's appeal be held in abeyance pending further order.
- July 8, 2014 – The Alberta Court of Appeal determined Mr. Khadr's sentence should be administered as a youth sentence and he should serve the remainder of his sentence in an adult provincial jail: ***Khadr Alta CA***.

- On April 25, 2015 Justice Ross granted Mr. Khadr judicial interim release pending the determination of the CMCR Appeal: ***Khadr v. Bowden Institution,*** 2015 ABQB 261 [***Khadr 2015 ABQB***]. On May 5, 2015 she determined the conditions of his release. A brief stay on her interim release order was lifted by the Court of Appeal on May 7, 2015 and Mr. Khadr was released.
- May 14, 2015 – The Supreme Court of Canada confirmed Mr. Khadr's sentence to be a youth sentence: ***Khadr 2015 SCC***.

IV. Issues

[23] The issues in this application are:

1. Does s 5(1) of the *ITOA* preclude Mr. Khadr from applying for a s 94 *YCJA* review?
2. If the answer to issue (1) is yes, should Mr. Khadr be ordered released from custody and placed on conditional supervision pursuant to s 105 of the *YCJA* and if so, for how long and on what conditions?

V. Relevant Legislation and *Treaty*

[24] The relevant sections of the *Treaty Between Canada and the United States of America on the Execution of Penal Sentences*, 2 March 1977, 1133 UNTS 159, Can TS 1978 No 12 (entered into force 19 July 1978) [*Treaty*], and of the *YCJA* and *ITOA* are set out in Appendix 1.

VI. Jurisdiction

[25] No issue was taken with this Court's jurisdiction to conduct a s 94 *YCJA* review having regard to s 13(2) of the *YCJA*, which states that in the case of serious offences like murder, a superior court justice will sit as a youth justice court judge.

VII. Where the parties agree

[26] Mr. Khadr, the AG Can and the ACPS agree that:

(a) A review under s 94 does not contravene s 5 of the *ITOA*; and
(b) Mr. Khadr has served the custody portion of his sentence, and there is no requirement for additional custody.

VIII. Issue #1: Does s 5(1) of the *ITOA* preclude Mr. Khadr from applying for a s 94 *YCJA* review?

[27] The AG Can and the ACPS do not dispute the youth justice court's jurisdiction to review Mr. Khadr's sentence under s 94, notwithstanding s 5 of *ITOA*. I will, however, address the issue for the sake of completeness and context.

[28] Section 5(1) of *ITOA* provides that "[t]he verdict and the sentence, if any, are not subject to any appeal or other form of review in Canada." The objective of a s 94 review is to monitor and reward the rehabilitation and progress of an offender and ensure that appropriate treatment and programs are made available. The review focuses on what can now best advance the young

person's needs and the interests of society, and requires a balancing of these two considerations: ***R v CK*** (2008), 233 CCC (3d) 194 (Ont Ct Just), at paras 16-17.

[29] Section 13 of the *ITOA* provides that a "sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and their sentence imposed by a court in Canada." Similarly, s 29(1) of the *ITOA* supports the availability of a s 94 *YCJA* review, as it provides that the *YCJA* applies to Canadian offenders following their transfer to Canada under the *ITOA*.

[30] In ***Khadr 2015 ABQB***, Ross J referred, at para 51, to Article IV of the *Treaty*, which excludes proceedings "intended to challenge, set aside, or otherwise modify convictions or sentences" but permits proceedings "which relate to the completion or carrying out of the offender's sentence according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise."

[31] Ross J concluded that s 5 of the *ITOA* does not preclude a "review" of a foreign conviction or sentence (at para 64):

> As counsel for the Applicant observed, s 5 cannot have been intended to preclude a "review" in the sense of an examination of a foreign conviction or sentence. Such an examination may be crucial in the context of proceedings that are specifically provided to be subject to Canadian law, including parole proceedings. The Alberta Court of Appeal embarked on a detailed examination of the Applicant's sentence when considering whether the sentence should be served in a provincial correctional facility or a federal penitentiary: ...(***"Khadr Alta CA"***)

[32] Ross J referred to the *Handbook on the International Transfer of Sentenced Persons* (New York: UNODC, 2012) published by the United Nations Office on Drugs and Crime (at para 71):

> The enforcement of a sentence relates also to release from it. The general rule, subject to important exceptions for pardons and amnesties discussed below, is that release is also governed by the law of the administering state.

[33] Section 94 *YCJA* review applications are akin to parole proceedings, except they are conducted before youth court judges:

> The *YCJA* gives the youth justice court a continuous authority to review sentences to ensure they meet the changing needs and circumstances of a young offender...
>
> The release provisions under section 42(2)(n) of the *YCJA* are in some ways, broadly similar to those that apply to adults seeking release on parole...As discussed above, there is the possibility of a sentence review and an early youth justice court-ordered release under s. 94 after one-third of the total sentence has been served.
>
> Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin Law, 2012) at 620, 623.

[34] The focus of the proceeding under section 94 is on the young person's progress since being incarcerated and does not involve a review of the trial process for error. Mr. Khadr referred to ***R v M(JJ)***, [1993] 2 SCR 421, decided under the former s 28 of the *Young Offenders Act*, RSC

1985, c Y-1, which created substantially the same form of review now contained in s 94. Cory J, for the Court, described the purpose of s 28 (at para 33):

> It provides an incentive to young offenders to perform well and to improve their behaviour significantly as quickly as possible. As well, it gives an opportunity to the court to assess the offenders again and to make certain that the appropriate treatment or assistance has been made available to them. It introduces an aspect of review and flexibility into the sentencing procedure, with the result that any marked improvement in the behaviour, outlook and performance of the offender can be rewarded and deterioration assessed. The Act provides a system that is akin to, yet broader than, the probation review provided for adult offenders.

[35] Fruman JA in ***R v LKB***, 2002 ABCA 227 noted that in considering the old s 28, the focus of the review is on changes of circumstances since the date of the original sentence (at para 10):

> A technical reading of s 28(3) of the *Young Offenders Act* might permit a judge to review a sentence before it begins. However, an examination of that provision in the context of the entire *Act* indicates that the review procedure is intended to provide for a reassessment of circumstances subsequent to sentencing. For example, s. 28(7) does not permit a court to review a disposition until it has required the provincial director to submit a progress report on the performance of the young person since the disposition took effect. In addition, the express grounds for review in ss. 24(4)(a) to (c.1) relate to changes since sentencing, including progress made by the young person, a material change in the circumstances that led to committal, the availability of new services or programs, and greater opportunities for rehabilitation in the community. Section 24(4)(d), which permits a review "on such other grounds as the youth court considers appropriate", must also be read in this context. The review process cannot be used as a means of imposing a sentence that Parliament did not authorize.

[36] While provisions of the *YCJA* respecting appeals from conviction and sentence are contained within Part 3, entitled "Judicial Measures" and are ousted by s 5(1) of the *ITOA*, s 94 is contained within Part 5, entitled "Custody and Supervision." This supports s 94 relating to the administration of the sentence rather than appeals or reviews for error.

[37] Finally, Mr. Khadr's age does not negate his right to seek a s 94 *YCJA* review, as adults serving youth sentences in adult correctional facilities retain the right under ***CK*** to apply for a s 94 review notwithstanding a concurrent right to apply for parole.

[38] I therefore find that s 94 of the *YCJA* authorizes a proceeding related to the completion and carrying out of sentences as set out in Article IV(1) of the *Treaty*. While the language of s 94 describes the process as a "review," it is not an "appeal or other form of review" excluded by s 5(1) of the *ITOA*. As noted by Mr. Khadr's counsel, Parliament could not have intended to abrogate the only avenue for young transferees to seek early release from custody. This would also disincentivize young persons from good behaviour and rehabilitation and defeat one of the purposes of the *ITOA* also set out in s 3 of the *YCJA*, namely, to contribute to the rehabilitation of offenders and their reintegration into the community.

IX. Issue #2: Should Mr. Khadr be ordered released from custody and placed on conditional supervision pursuant to s 105 of the *YCJA* and if so, for how long and on what conditions?

1. Applicant's Submissions

[39] Mr. Khadr submits that he should be placed on conditional supervision for a period of one day and his sentence should then expire. He pointed out that if he had applied for a review in May 2015 pursuant to s 94 of the *YCJA* rather than for judicial interim release pending his CMCR Appeal, at worst, he would have been placed on conditional supervision within 3 ½ months and his sentence would have expired at the end of October 2018. The conditions applicable to release on conditional supervision under s 105 of the *YCJA* essentially mirror those imposed by Ross J's interim release order.

[40] Mr. Khadr argues that s 94(19)(b) permits the Court to decrease or terminate the youth sentence. It reads that the Court may release and place the young person under conditional supervision "for a period not exceeding the remainder of the youth sentence." He argues that the authority to shorten the term of conditional supervision is a logical inference because the words "for a period not exceeding the remainder of the youth sentence" would be entirely superfluous if the legislative intention was only to place the young person under conditional supervision for the remainder of the sentence.

[41] Counsel for Mr. Khadr also notes that Mr. Khadr's rehabilitation and reintegration into the community have been successful:

- His behaviour was exemplary even in less than ideal conditions of GTMO, where he was described as "highly compliant," and was housed in minimum security. Canadian officials visiting him described him as a "gentle, humorous, thoughtful and intelligent young man" who carried a "sense of hope and generally positive outlook on life." Staff Advocate, Cpt. McCarthy of the USAF, assigned to the GTMO camps, said in a letter that of all the detainees he interacted with, Khadr was "without question, the most polite and friendly." He was always compliant with the Cpt's instructions and did not become angry or hostile when requests for an exception to standard operating procedures was denied.
- Following Mr. Khadr's transfer to Canada and placement in federal correctional facilities, periodic CSC reports recorded positive behaviour, resulting in his security classification being reduced from maximum to medium. In a report his parole officer prepared for his parole hearing, Mr. Khadr was described as a model prisoner and recommended he be released on day parole, not statutory release or full parole due to the need for gradual reintegration. Ross J referred to Mr. Khadr having provided Affidavit evidence "... that he has been entirely cooperative and a model prisoner during his detention by US and Canadian authorities, that he has strong community support and is therefore a low risk to public safety." (***Khadr 2015 ABQB***, at para 99). Ross J noted that the Respondents did not challenge the affidavit evidence presented by Mr. Khadr.
- Mr. Khadr stated in his February 4, 2019 Affidavit that following his interim release, he obtained high school diploma equivalency and was accepted into Nursing last year. However, he has been unable to devote all his attention to the program because of the various proceedings and was obliged to withdraw his registration. He has not been in

trouble of any kind with authorities. He is now married. He visits his family in Toronto on average twice per year. Since his release, no one has attempted to influence him into adopting any sort of extremist or violent views and he has not adopted any such views. He volunteers his time helping refugees integrate into the local community. The Respondents did not challenge his Affidavit evidence.

- The application record contains glowing letters of support from various individuals who have been in contact with him since his release, including his long-time psychologist.

2. AG Can's Submissions

[42] As earlier noted, the AG Can is opposed to Mr. Khadr's release on conditional supervision for one day after which his sentence would expire. While not opposed to Mr. Khadr being placed on conditional supervision under s 94 of the *YCJA*, the AG Can submits its duration should be for the remaining 3 1/2 years of his sentence and the applicable conditions should be the same as provided for in Ross J's December 21, 2018 decision reviewing the conditions of Mr. Khadr's interim release. He would not be precluded from seeking a modification of those conditions in the s 94(2) *YCJA* annual review.

[43] The AG Can submits that the purpose of a s 94 review is not to revisit or re-determine the sentence, but to determine if the sentence should be continued under conditional supervision rather than in custody. A youth justice court under s 94 may modify the manner in which the sentence is to be served, not the duration of the sentence imposed.

[44] Tellingly, the AG Can argues, Parliament expressly enabled a youth justice court on a s 59 *YCJA* review, involving sentences for offences other than murder and other serious offences, to terminate the youth sentence and discharge the young person from any further associated obligation under s 59(7)(b). A similar provision was not included in the s 94 process. Parliament has also provided for termination of probation orders in s 732.2(3)(c) of the *Criminal Code*. If Parliament intended to empower youth justice courts to terminate or shorten conditional supervision orders, it would have done so expressly as it did in these other cases.

[45] The AG Can also submits that s 5(1) of the *ITOA* also precludes the termination of Mr. Khadr's sentence. The Alberta Court of Appeal in ***Khadr Alta CA*** referred to a fundamental principle underlying the *ITOA* (at para 5):

> The courts of this country and the Canadian government must respect the substance of the sentence imposed in the foreign state, here the United States, along with its right to determine that sentence. It is only where a sentence is incompatible with the laws of Canada or where Canadian law so requires that Canada may adapt a foreign sentence to a punishment prescribed under Canadian law for an equivalent offence. The eight-year sentence, which reflects Khadr's cumulative culpability for an all five offences, is not incompatible with Canadian laws. Nor does Canadian law mandate adaptation of that sentence. Khadr's sentence was the direct result of a plea agreement. Khadr agreed to waive certain rights and plead guilty to five offences in exchange for a commitment that his sentence would be a maximum of eight years. The plea agreement could not have been implemented without the express approval of the designee of the United States Secretary of Defence. Under the ITOA, no one is entitled to second-guess

> that decision or the sentence, much less convert the eight-year inclusive sentence into something other than what it is.

[46] The AG Can points out that s 94 of the *YCJA* enables the types of reviews described in Article IV of the *Treaty*, namely, "... the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise." The s 94 review focuses on the manner in which the young person serves the youth sentence, not its duration.

3. ACPS Submissions

[47] The ACPS submits that this Court should apportion Mr. Khadr's sentence between custody and conditional supervision. The ACPS noted that had Mr. Khadr been sentenced by a youth justice court, the court would have apportioned his eight-year sentence of confinement pursuant to s. 42(2)(q) of the *YCJA*. It provides for a 60/40 apportionment of a youth sentence for first degree murder between custody and conditional supervision. The ACPS submits that this apportionment would likely have been imposed had Mr. Khadr been sentenced by a youth justice court. The ACPS further submits that the youth justice court may also make another apportionment in this case, namely 56/44 reflecting his time spent in custody, the Respondents being in agreement that no further custody is required.

[48] As this application is the first involvement of the youth justice court in this case, I make the recommended apportionment of 56/44. No further period of custody is therefore required.

[49] Before the scheduled date of the appeal to the Supreme Court of Canada in relation to the characterization of his sentence, the Court's registry inquired whether the AG Can's appeal was rendered premature in light of Mr. Khadr's legal challenge to his convictions in the US. In a letter dated May 11, 2015, counsel for the AG Can responded that:

> The Court's decision may also determine whether [Mr. Khadr] is serving an adult or a youth sentence, which impacts Mr. Khadr's statutory release date **because the date on which he is entitled to be released if he is serving a youth sentence (August 19, 2015)** is earlier than his statutory release date if he is serving an adult sentence (October 20, 2016).
>
> [Emphasis added]

[50] The AG Can thus acknowledged in May of 2015 Mr. Khadr's entitlement to be released within three months' time (a calculation based on a 60/40 apportionment between custody and conditional supervision). I therefore find that the AG Can would have adopted the same position on apportionment had the context in 2015 been a s. 94 review.

[51] The ACPS, like the AG Can, asserts that since Ross J's order provided that time while on interim release does not count as part of the sentence, the logical conclusion is that when the interim release concludes, the sentence continues and should be served under conditional supervision under the terms of s 105 of the *YCJA*.

[52] Following the hearing I advised counsel that I had reviewed a number of decisions not directly referenced in their submissions and asked them to provide any additional comments. Their positions are summarized in my analysis of these cases later in my reasons.

4. Analysis

A. Principles underlying the *YCJA*

[53] My analysis of the conduct of a review under s 94 of the *YCJA* must start with a discussion of how youth criminal justice differs from the adult criminal justice system. In ***R v DB,*** [2008] 2 SCR 3, the Supreme Court of Canada discussed the underlying differences between adult and youth criminal proceedings. Abella J held that in youth matters there is a presumption of diminished moral blameworthiness arising from a young person's reduced maturity, heightened vulnerability, and reduced capacity for moral judgment (at para 41). She further held that this presumption is a principle of fundamental justice (***DB*** at paras 47, 61, and 69) legally recognized in both Canadian and international law (***DB*** at para 67). Such recognition is found, for example, in the *United Nations Convention on the Rights of the Child.*[1]

[54] The *YCJA* sets out a number of principles in s 3, including protection of the public, rehabilitation and reintegration of the young person, fair and proportionate accountability, enhanced procedural protection, and timely and prompt intervention. These principles apply to the entire youth criminal justice system, including a review under s. 94 of the *YCJA*. In ***DB*** (at para 58) Abella J noted that the preamble to the *YCJA*:

> ... recognizes society's "responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood"; encourages "guidance and support"; and seeks "effective rehabilitation and reintegration".

[55] While this preamble has changed to place greater emphasis on public protection and the accountability of the young person since the decision in ***DB,*** the principles recognizing diminished moral blameworthiness and the importance of intervention, rehabilitation, and reintegration remain in s 3(1)(a). According to Clayton Ruby et al, *Sentencing,* 9th ed, (Toronto: LexisNexis Canada, 2017) at para 22.5:

> The amendment to section 3(1)(a) appears to create an emphasis shift in the *YCJA* by focusing on the protection of the public and the accountability of the young person up front. But it is important not to overstate the significance of this change. While the objective of protecting the public was not stated at the beginning of the section before the enactment of Bill C-10, it was nonetheless stated. Moreover, the newly amended section 3(1)(a) continues to emphasize the "rehabilitation and reintegration of young persons" and even specifically mentions "referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour." This reference did not exist in the pre-Bill C-10 version of section 3(1)(a). Thus, it is fair to say that Parliament has

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[1] The United States has signed the *Convention on the Rights of the Child*, but has not ratified it: *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, signature by United States of America 16 February 1995). The United States has also signed and ratified two Optional Protocols: one on the sale of children, child prostitution and child pornography, 25 February 2000, 2171 UNTS 227 (entered into force 18 January 2002, signature by United States of America 5 July 2000, ratification by United States of America 23 December 2002), and the other on the involvement of children in armed conflict, 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002, signature by United States of America 5 July 2000, ratification by the United States of America 23 December 2002). However, the signing of both optional protocols was accompanied by a declaration from the United States that by becoming a party to the Protocols they were assuming no obligations under the *Convention on the Rights of the Child*.

maintained its commitment to the animating principles that drove the creation of the *YCJA*—rehabilitation and reintegration and the use of non-custodial measures to reduce crime among young persons.

B. What is a review under s 94?

[56] Under the *YCJA*, a sentence for a young person convicted of first-degree murder is composed of two portions: custody and conditional supervision. Under s 42(2)(q), the maximum sentence is 10 years, with a maximum custodial portion of six years and conditional supervision in the community for the remainder. The conditions of supervision are set out in s 105.

[57] Section 94 provides four avenues for a review; subsections (1), (2), and (3) deal with a review when a young person is in custody. Only s 94(4) involves the possibility of a review for a youth not in custody. Under s 94(4), a young person can be brought before the youth justice court at any time other than those referred to in subsections (1)-(3).

[58] Under s 94(6), there are a number of grounds for review, among them: the young person has made sufficient progress to justify a change in the youth sentence, that circumstances have changed materially and, under s 94(6)(e), "any other ground that the youth justice court considers appropriate."

[59] Under s 94(9), the youth justice court must review a progress report on the young person's performance since the youth sentence took effect. Mr. Khadr and the Respondents took no issue with the CSC reports in the application record being considered as the progress reports required to be completed under s 94(9) of the *YCJA,* and I considered them as such.

[60] Under s 94(19), the youth justice court has wide discretion to confirm a youth sentence or to release the young person from custody and place the young person under conditional supervision as set out in s 105, with any modifications the circumstances require, "for a period not exceeding the remainder of the youth sentence that the young person is then serving." That discretion is informed by both the needs of the young person and the interests of society.

[61] Thus, s 94 provides wide discretion to the youth justice court to both determine the appropriate grounds for review and to craft conditional supervision conditions that reflect the particular circumstances and needs of the young person.

[62] I find that Mr. Khadr has raised appropriate grounds for review under s. 94(6). In particular, he noted the unique circumstances of his case: he was transferred to Canada to serve a sentence imposed by the United States; there was initial uncertainty as to whether the sentence would be administered in Canada as an adult or youth sentence; and he is presently not in custody, but has been on judicial interim release for almost 4 years pending the CMCR Appeal that has apparently stalled, through no fault of his own, for an indefinite period.

[63] I find these are unique circumstances, and that clarity about Mr. Khadr's status can be best obtained through a s 94 review. He has served what the Respondents agree is the custodial portion of his sentence. Further, under Ross J's interim release order, he has been subject to significant restrictions on his liberty (summarized in a table later in these reasons). What remains to be determined is the appropriate period of conditional supervision. Under s 94(19)(b), I may release the young person subject to the appropriate conditional supervision, modified as necessary to meet the particular circumstances, and keeping in mind that the conditional supervision cannot exceed the remainder of the youth sentence. This leads to the question: what is the remainder of Mr. Khadr's sentence?

C. Can the Court consider the time Mr. Khadr has been out of custody under bail conditions?

i. Sentencing decisions look to the effect of pre-sentence restrictions

[64] Canadian courts have emphasized the importance of looking to the substance of the matter, rather than merely its form, to ensure that justice is done: see ***R v Wust***, [2000] 1 SCR 455 at para 9; ***R v McDonald***, (1998) 40 OR (3d) 641 (ONCA) at 659; ***R v. Wooff*** (1973), 14 CCC (2d) 396 (ONCA) at 398 (in dissent).

[65] In those three cases, the issue was whether a court could take pre-sentence custody into account when sentencing. The Ontario Court of Appeal in ***R v Sloan*** (1947), 3 CR 107 (ONCA) held that at common law , a court could not backdate a sentence, however, it could consider any "period of incarceration ... between the date of arrest and the date of sentence" in reaching its sentencing decision (at para 2), notwithstanding the *Criminal Code* provided that the sentence commenced on the day the sentence is imposed. At para 2, Roach JA said:

> The sentence can only bear the date on which it is imposed and any term of imprisonment contained therein cannot begin to run earlier than the date of the sentence itself. That is not to say that the Court cannot take into consideration, in imposing sentence, any period of incarceration which the accused has already undergone between the date of his arrest and the date of sentence, but such period cannot form part of the term imposed by the sentence. If the Court is of the opinion that the circumstances justify such a course, it may reduce the term of imprisonment, which it would otherwise impose.

[66] This principle recognizing pre-trial custody in sentencing was codified in what is now s 719(3) of the *Criminal Code*: ***McDonald*** at 73; ***Wust*** at para 31.

[67] In ***Wooff***, the accused was found guilty of drug trafficking. Under principles of sentencing, drug trafficking convictions required a term of incarceration. The majority refused to consider the accused's pre-trial incarceration as part of a custodial sentence, but Dubin JA, in dissent, disagreed and applied pre-trial detention to conclude that the suspended sentence imposed by the trial judge was justified. At para 15, he noted that he chose to consider the substance of the sentence, rather than merely its form.

[68] Dubin JA's dissent was adopted by Rosenberg JA in ***McDonald***. In that case the Court of Appeal was dealing with the question of mandatory minimum sentences and whether pre-trial custody could be considered when sentencing. The mandatory minimum sentence in question was four years, and the accused had spent 6 1/2 months in pre-trial custody. The trial judge gave him no credit for this time. On appeal, Rosenberg JA conducted a thorough analysis of both the *Criminal Code* section establishing the mandatory minimum sentence and s 719(3). Relying on principles of statutory interpretation and reference to *Charter* values, Rosenberg JA held that pre-trial custody could be considered even if such credit resulted in reducing the sentence imposed on conviction below four years, since the total punishment would still equal the mandatory minimum of four years. He indicated that it is the substance of the matter that should be considered, and that in imposing sentence, the total punishment should take into account pre-sentence custody.

[69] Counsel for Mr. Khadr, in response to my invitation for comments on these cases, noted that ***McDonald*** and ***Wooff*** concluded it is appropriate to give credit for pre-sentence custody, even though such custody does not formally make up part of the sentence. This is so even if the resulting sentence falls below a mandatory minimum. This approach avoids disparities between offenders when one receives bail and another does not. By analogy, he argues Mr. Khadr's time under bail conditions should be credited towards time required under conditional supervision, even if there is a formal distinction between bail and conditional supervision.

[70] Counsel for Mr. Khadr argued that the Supreme Court of Canada took a similar approach in ***Wust***, where Arbour J noted, at para 9:

> For the reasons that follow, I find Rosenberg J.A.'s analysis in ***McDonald*** compelling. The ***McDonald*** decision makes it clear that this Court can uphold both Parliament's intention that offenders under s. 344(a) receive a minimum punishment of four years imprisonment and Parliament's equally important intention to preserve the judicial discretion to consider pre-sentencing custody under s. 719(3) and ensure that justice is done in the individual case.

[71] The context for this analysis involves s 719 of the *Criminal Code*; s 719(1) provides that a sentence commences when imposed, while s 719(3) provides that a court may take into account any time spent in custody by the person as a result of the offence. However, s 344(a) provides for a mandatory minimum sentence of four years. Arbour J in ***Wust*** adopted Rosenberg JA's conclusion that it was necessary to read these provisions in a manner that avoided the irrational and unjust result that would occur if pre-sentence custody could not be considered (at para 33) . She stated(at para 37):

> No violence is done to the language of the Code when the sections are read together, in French or in English, and are understood to mean, as Parliament intended, that an offender will receive a minimum sentence of four years, to commence when it is imposed, and calculated with credit given for time served.

[72] In other words, even though the *Criminal Code* provided for a mandatory minimum sentence of four years, and further provided that a sentence commenced when imposed, a sentence less than four years could be imposed by taking into account pre-sentence custody. In effect, 6 months of the mandatory minimum 4-year sentence was served before sentencing.

[73] A similar approach was also applied to pre-sentence driving prohibitions in ***R v Lacasse***, 2015 SCC 64 despite there being no express statutory authority similar to s 719(3) permitting credit for pre-sentence release restrictions. Wagner J noted that courts have appeared to be reluctant to give credit for restrictive release conditions because the accused was not in custody — "bail is not jail" (at para 112), but he noted that "the driving prohibition has the same effect regardless of whether it was imposed before or after the respondent was sentenced." He concluded (at para 113):

> In short, where a driving prohibition is not only one of the release conditions imposed on an accused but also part of the sentence imposed upon his or her conviction, the length of the presentence driving prohibition **must** be subtracted from the prohibition imposed in the context of the sentence.
>
> (Emphasis added)

[74] Further, our Court of Appeal has held that it is open to a sentencing judge to consider stringent bail terms and give credit for that time. In ***R v Lau,*** 2004 ABCA 408, at paras 15-16, the Court noted:

> Similarly, a trial judge may take account of very strict bail conditions and treat that as akin to custody in calculating a sentence...But whether or not to give such credit, and how much, is a matter within the judge's discretion, having regard to such factors as the intrusiveness of the terms of the judicial interim release.

[75] In ***R v Newman,*** 2005 ABCA 249, the Court of Appeal discussed ***Lau***, concluding that a judge can consider terms of release, like house arrest, when calculating the sentence, but that it is a matter of discretion as to whether and how much credit to grant. In the circumstances of ***Newman***, Conrad JA held that it may not be a one-for-one credit, since house arrest is not necessarily synonymous with serving an equal term of imprisonment. She went on to note at para 20:

> We note that a pre-trial custodial term often gets credit on a two-for-one basis and sometimes even a three-for-one basis. In part, the credit recognizes the possibility of early parole. As the offenders here were found by the sentencing judge to be rehabilitated by the time of sentencing, he no doubt recognized that they would have been good candidates for early parole. Thus, a sentence term imposed may not be fully served... [T]he sentencing judge reviewed the case law on point, the circumstances of the offenders and the restrictions that were placed on these respondents during their release on bail...In our view, the sentencing judge did not perform an automatic procedure. He properly reviewed the relevant factors and, at the end of this review, he passed sentence and exercised his discretion to give the respondents full credit for this house arrest.

[76] In ***R v Ewanchuk***, 2002 ABCA 95 the Court of Appeal was dealing with a Crown sentence appeal, and held it was appropriate to consider the bail conditions imposed pending the appeal (at para 87). The appropriate sentence would have been three years' imprisonment, but taking into account that the accused had been under strict bail conditions amounting to house arrest and that he had not committed any offences during that time, the Court only increased his sentence to two years.

[77] Counsel for Mr. Khadr submitted that the ***Lau, Newman,*** and ***Ewanchuk*** decisions confirm sentencing judges' discretion to consider non-custodial restrictions when sentencing. That discretion recognizes that such conditions are generally less onerous than imprisonment, and therefore credit for sentencing may not, as Conrad JA explained, be synonymous with an equal term of imprisonment, Here, however, he notes Mr. Khadr is seeking credit for the time under the bail release conditions against the remaining time under conditional supervision – two virtually identical sets of restrictions on his liberty.

ii. Mr. Khadr's conditions on bail

[78] Mr. Khadr has been subject to significant bail restrictions for almost 4 years. I note that the bail conditions ordered by Ross J on May 5, 2015 are, as suggested by counsel for Mr. Khadr, strikingly similar to the conditions of conditional supervision set out in s. 105(2) and (3) of the *YCJA*:

Order of Release, 5 May 2015, Ross J	**Corresponding *YCJA* Conditions**
It is ordered that the Application be allowed and the Applicant be released upon his entering into a Recognizance in Form 32, before a Justice, in the sum of $5,000.00, with no cash deposit, and the Recognizance shall be on the following conditions, namely:	**s 105(2)** – Mandatory Conditions (MC) **s 105(3)** – Optional Conditions (OC)
(a) You shall keep the peace and be of good behaviour, and appear before the Court when required to do so.	s. 105(2)(a) MC s. 105(2)(b) MC
(b) Upon release from custody, you shall report in person to a bail supervisor within two working days of release. In this order, the term, "your supervisor" refers to your bail supervisor and includes his or her designate. Thereafter you shall report to your supervisor as required by, and in the manner directed by, your supervisor and shall reside at such address as your supervisor may approve and shall not change that address without the prior written consent of your supervisor.	s. 105(2)(c) MC s. 105(2)(e) MC s. 105(2)(f) MC s. 105(2)(h) MC
(c) In the event that you seek and maintain employment or education or training, you shall provide proof of attendance at your place of employment, education or training (including any schedule) to your supervisor and, you shall advise your supervisor in writing of the name, address, and telephone number of your employer, educational institution or training facility.	s. 105(2)(f) MC
(d) You shall continue under the care of [doctors], or such other counsellor as approved by your supervisor.	s. 105(3)(g) OC
(e) You shall reside with Dennis Edney, QC, and Patricia Edney ("the Edneys"), at [address]. . ., and will not change your address without prior written approval from your Supervisor....	s. 105(2)(f) MC s. 105(3)(d) OC s. 105(3)(e) OC
(f) You shall observe a nightly curfew of 10:00pm to 7:00am, and shall present yourself at the door to a peace officer for the purpose of monitoring compliance, except in the case of a personal medical emergency.	s. 105(3)(h) OC
(g) You shall remain within the Province of Alberta except (i) with the prior written authorization of your Supervisor, and (ii) you may go to British Columbia for the purpose of visiting the Edneys' vacation home with the Edneys with prior notice to your supervisor, including the address and period of time, and with arrangements for continued reporting.	s. 105(2)(f) MC s. 105(3)(f) OC
(h) You shall diligently pursue your appeal or review before the Court of Military Commission Review ("CMCR") in Case 13-005, and shall comply with all timelines imposed by the rules applicable to said appeal or as may be directed by the CMCR.	s. 105(3)(h) OC

(i) Should your appeal or review be dismissed by the CMCR, you shall report to the Bowden Institution, or a provincial correctional facility as approved by your supervisor, as appropriate, for committal within seven (7) days from dismissal.	s. 105(3)(h) OC
(j) You shall abstain from communicating, directly or indirectly, with [named persons], and any other individual member of the [their] families.	s. 105(3)(h) OC
(k) Any contact with your family shall be only by way of telephone or video communication, the conversation in English, and in the presence of at least one of the Edneys or your supervisor. Any in person visits with members of your family shall be only with the prior written approval of your supervisor and shall be conducted in the presence of the Edneys or your supervisor.	s. 105(3)(h) OC
(l) You shall abstain from communicating, directly or indirectly, with any member of a terrorist group as defined in s. 83.01 of the *Criminal Code* or individuals or organizations involved in extremist or terrorist activities.	s. 105(3)(h) OC
(m) You shall not possess, obtain, or apply for any travel documents, including a passport issued by any country.	s. 105(3)(h) OC
(n) You shall not possess any firearm, firearms licence, authorization or registration certificate related to the possession of firearms, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substances, as defined in the *Criminal Code*. All items that you are hereby prohibited from possessing shall be surrendered to the Edmonton Police Service. Additionally, all such items shall be forfeited to the Crown in right of Alberta unless otherwise ordered by the Court.	s. 105(2)(g) MC
(o) You shall continuously wear an electronic monitoring device, as provided by the Edmonton Police Service and at no cost to yourself or the Edneys.	s. 105(3)(h) OC
(p) You shall engage in no financial transactions of more than $1,000 without prior written approval from your supervisor.	s. 105(3)(h) OC
(q) Electronic devices: a. You shall not access or possess a computer or any other type of device capable of accessing the internet; b. You shall not access the internet; c. Conditions (q)(a)-(b) do not apply if you are accessing the internet from your residence or at a recognized educational institution for lawful purposes; d. You shall provide your supervisor with a list of all of the devices you use to access the internet;	s. 105(3)(h) OC

e. You shall provide your supervisor access to your internet devices to confirm compliance with the computer and internet conditions; f. At the request of your supervisor, you shall install on every computer you use at your residence, remote computer monitoring software that is approved by your bail supervisor at no cost to yourself or the Edneys. You shall allow your bail supervisor to have remote access to your computer; g. You shall not attend any commercial establishment which offers use of computers to the public.	

[79] The only mandatory condition in s 105 of the *YCJA* that is not reflected in Ross J's interim release order is s 105(2)(d) — "inform the provincial director immediately on being arrested or questioned by the police," but I find this provision can be taken to have been included in the condition "[t]hereafter you shall report to your supervisor as required by, and in the manner directed by, your supervisor." Even after Ross J relaxed some of Mr. Khadr's release conditions, the remaining conditions continued to reflect the mandatory conditions in s 105 of the *YCJA*.

[80] I note also that many of the conditions under the May 2015 interim release order exceed the mandatory requirements of s 105 of the *YCJA*.

iii. Can sentencing decisions apply to these circumstances?

[81] The Respondents argue that the decisions in ***Wooff, McDonald, Wust, Lacasse***, ***Lau***, ***Newman***, and ***Ewanchuk*** are not relevant because they are **sentencing** decisions, and the application before me is about **sentence administration**. The AG Can asserts the youth justice court has no jurisdiction under s 94 of the *YCJA* or the *ITOA* and the *Treaty* to change a sentence since s 94 is only a process by which the Court may determine how the remainder of the sentence should be served. I need not decide whether there is authority under s 94 of the *YCJA* to change the duration of a sentence of a young person charged and convicted in Canada. I rely on these cases not for the proposition that credit for pre-trial restrictions can be given when sentencing or changing a sentence, but for the proposition that restrictions on liberty, whether imposed pre-trial or as part of bail conditions may, in their substance and effect, be considered as part of the punishment imposed and the punishment served.

[82] In essence, the Respondents' argument is that comparing sentencing decisions to sentence administration decisions is like comparing apples to oranges. I conclude, however, that the principles underlying sentencing are broadly applicable to my s. 94 *YCJA* review function.

[83] The jurisprudence indicates that pre-sentence credit can be granted for restrictions other than custody, including driving prohibitions and bail restrictions. Moreover, where the sentence and the pre-sentence restriction are the same or similar, the pre-sentence restriction can be deducted from the sentence.

[84] The narrowest reading of these cases gives the Court authority to consider and apply pre-trial restrictions to the calculation of sentences. However, in my view, a broader interpretation is mandated by s. 94(19) and the objects of the *YCJA*: the youth justice court, as part of its s. 94 review function, should consider the substance of the restrictions that have been imposed on a

young person as comprising part of the punishment or sentence and when determining the length of time, if any, the young person will remain subject to release on conditional supervision. In ***Wust***, at para 36, Arbour J noted that what is relevant in interpreting what meaning to give to "sentence," "punishment," or "sentencing" is not the words chosen, but the concepts the words carry.

[85] The Court's sentence administration role under s. 94 is fundamentally about release and, in this case, Mr. Khadr's judicial interim release was, in its substance and effect, the same as that mandated for conditional supervision. In that regard, I note the statement of Michael Abbell in *International Prison Transfer*, 2010 (Leiden: Martinus Nijhoff Publishers, 2010) at p 127:

> [T]he Bolivian, Canadian, Mexican, Panamanian, and Thai treaties provide that the transferred sentence is to be executed in accordance with the laws of the administering country. Under these treaties, the administering country simply accepts the length of the United States sentence as a given and **applies its own laws** concerning the release or conditional release of **offender to the determination of the length of time the offender will remain in custody and the length of time, if any, he will remain on supervised release.**
>
> [Emphasis added]

[86] I conclude that these sentencing cases are broadly relevant to understanding what restrictions constitute part of a sentence.

iv. Does the bail order prevent consideration of the judicial interim release conditions when conducting the s 94 review?

[87] The Respondents argue that Ross J's interim release order expressly states the sentence does not run during Mr. Khadr's time on judicial interim release. In particular, the AG Can asserts that Ross J granted interim release "on the basis" that the time under bail restrictions would not count as time under the sentence. I disagree. First, at issue before Ross J was whether judicial interim release was available under the *ITOA* and the *Treaty*, the balancing of the appeal's merits with the seriousness of the offences, and whether continued detention was necessary in the public interest (***Khadr 2015 ABQB*** at paras 73, 101).

[88] While Justice Ross's May 2015 order stated that the time on judicial interim release did not count towards sentence, it was not in the context of a s. 94 *YCJA* application, but in an application for release from custody. At that point, Mr. Khadr had essentially served the custodial portion of the youth sentence, but the question of whether the sentence was a youth or adult sentence was still the subject of a pending appeal before the Supreme Court of Canada. Ross J's order was focussed solely on interim release pending the CMCR Appeal, which has not progressed at all in the last nearly 4 years. Moreover, the term of the order that time on judicial interim release "shall not count as part of any sentence imposed on the Applicant which will be deemed interrupted" can be understood and interpreted as "bail is not jail." Such time on interim release would not count towards the interrupted **custodial** portion of the sentence from which Mr. Khadr would have been entitled to release approximately 3 ½ months later (as the AG Can noted in its May 11, 2015 letter to the registry of the Supreme Court of Canada).

[89] I conclude that paragraph 1 of Ross J's interim release order does not prevent me from considering the impact of Mr. Khadr's bail conditions on a subsequent s 94 *YCJA* review. I am not ignoring her order, any more than the Supreme Court of Canada was ignoring the mandatory

minimum sentences in ***Wust*** or s 719(1) in ***Lacasse***. Like the statutory mandatory minimum provisions and the provision that a sentence cannot begin to run until imposed, the bail order must be considered in context. That context is now framed by s. 94 of the *YCJA*.

v. Has Mr. Khadr served his sentence?

[90] I find that the decision in ***Wust*** and Rosenberg JA's dissent in ***McDonald*** are analogous to Mr. Khadr's situation. Notwithstanding time does not run until the sentence is imposed, in ***Wust*** credit was given for the pre-sentence time in custody as though that portion of the sentence had already been served. Similarly, in this case, credit can be given for the time spent under conditions of community supervision as though the conditional supervision portion of Mr. Khadr's sentence has been served.

[91] While s. 94 of the *YCJA* does not expressly provide authority to credit time under interim release to conditional supervision, Mr. Khadr has been subject to restrictions essentially mirroring those of conditional supervision since May 2015, a period of close to 4 years. I find further reinforcement for this position from the AG Can's submission that the same terms imposed by Ross J in her bail order would be the appropriate terms to impose in the s. 94 order. This demonstrates that those terms coincide with the *YCJA* mandatory requirements for conditional supervision orders.

[92] Keeping in mind the *YCJA* principles emphasizing that young persons are entitled to both timely and prompt intervention and to effective rehabilitation and reintegration, I credit Mr. Khadr for the time spent under the bail conditions that essentially mirror the mandatory conditions set out in s 105 of the *YCJA* governing conditional supervision orders.

[93] I find further support for my conclusion in the cases dealing with the procedural delays occasioned by appeal proceedings. In ***R v Arcand***, 2010 ABCA 363 and ***R v Hajar***, 2016 ABCA 222, the Alberta Court of Appeal noted that an offender should not be prejudiced by appeal delays beyond their control. In ***Arcand,*** the Court of Appeal held that although the Crown's sentence appeal was allowed and the offender's original sentence was increased from 90 days to two years' imprisonment, the fact that the appeal process had been so lengthy resulted in the Court exercising its discretion to stay the custodial portion of the sentence, stating (at paras 303-304):

> This appeal has been pending since the fall of 2008. Given the issues raised on this appeal, the delay in dealing with the substantive appeal has been more than 1 ½ years beyond what it would ordinarily have been. The offender has been caught up in this process which has implications beyond this appeal. He has long since completed the prison term imposed and has also successfully completed a significant part of his probation…Nothing about the procedural history of the appeal involves delaying tactics by either side. This appeal has taken a lot of time because it has needed that time.
>
> Accordingly, in these highly unusual circumstances, we stay the custodial portion of the sentence. We are satisfied that public confidence in the administration of justice would not be injured given these circumstances.

[94] Similarly, in ***Hajar*** process delays pending appeal were considered, and as a result, despite allowing the Crown's sentence appeal and finding that a fit sentence would have been higher than that imposed by the sentencing judge, the Court concluded it would not impose that

sentence. See also ***R v Rossi***, 2016 ABCA 43 at paras 6-8, where the Court of Appeal held that a fit sentence would have been higher than that imposed at trial, but again chose not to incarcerate the offender who had " gotten on with his life" in positive ways.

[95] Having regard to the lengthy and indefinite delay in the CMCR Appeal, and the progress Mr. Khadr has made towards rehabilitation and reintegration, I conclude it would not be just or consistent with the *YCJA* principles for Mr. Khadr to be placed for a further 3 ½ years on conditional supervision he has already, in substance, completed. The time under bail conditions is now longer than the conditional supervision would have been, and he is well past the statutory release date and the warrant release date, had he been serving even an adult sentence. I am not terminating or shortening Mr. Khadr's sentence. I find that he has served a period of community supervision that is in substance the conditional supervision portion of his sentence and in so finding, there is no breach of the *ITOA* or the *Treaty*.

[96] In the result, I conclude that Mr. Khadr has served his entire sentence.

[97] Having concluded that he has served his entire sentence, I am precluded by s 94 of the *YCJA* and s 5 of *ITOA* from imposing any additional conditional supervision that would exceed the remainder of his sentence.

[98] I therefore order that Mr. Khadr be placed on conditional supervision for one day, which I consider to have been served. His eight-year sentence having been served, he is no longer bound by Ross J's interim release order.

X. Conclusion

[99] For the reasons given, I conclude:

(a) A review under s. 94 of the *YCJA* does not breach the *ITOA* or the *Treaty*;
(b) Mr. Khadr's sentence is apportioned 56/44 between custody and conditional supervision; and
(c) Mr. Khadr has served the entirety of his eight-year sentence.

[100] I wish to thank counsel for their helpful written and oral submissions.

Heard on the 26th day of February 2019.
Dated at the City of Edmonton, Alberta this 25th day of March 2019.

Mary T. Moreau
C.J.C.Q.B.A.

Appearances:

Nathan J. Whitling
for the Applicant Omar Ahmed Khadr

Bruce Hughson
for the Respondents Dave Pelham, Warden
of the Bowden Institution and Her Majesty the Queen

Doreen Mueller
for the Alberta Crown Prosecution Service

Appendix 1

Treaty Between Canada and the United States of America on the Execution of Penal Sentences, 2 March 1977, 1133 UNTS 159, Can TS 1978 No 12 (entered into force 19 July 1978).

PREAMBLE

...

DESIRING to enable Offenders, with their consent, to serve sentences of imprisonment or parole or supervision in the country of which they are citizens, thereby facilitating their successful reintegration into society;

HAVE AGREED as follows:

...

ARTICLE IV

1. Except as otherwise provided in this Treaty, the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Sending State shall, in addition, retain a power to pardon the Offender and the Receiving State shall, upon being advised of such pardon, release the Offender.
2. The Receiving State may treat under its laws relating to youthful offenders any Offender so categorized under its laws regardless of his status under the laws of the Sending State.
3. No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the Sending State.

...

ARTICLE V

Each Party shall regulate by legislation the extent, if any, to which it will entertain collateral attacks upon the convictions or sentences handed down by it in the cases of Offenders who have been transferred by it. Upon being informed by the Sending State that the conviction or sentence has been set aside or otherwise modified, the Receiving State shall take appropriate action in accordance with such information. The [R]eceiving State shall have **no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside or otherwise modify** convictions or **sentences** handed down in the Sending State.

International Transfer of Offenders Act, SC 2004, c 21

Loi sur le transfèrement international des délinquants, LC 2004, ch 21

Purpose and Principles

Purpose
3 The purpose of this Act is to enhance public safety and to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals.

Effect of transfer
5(1) A transfer may not have the effect of increasing a sentence imposed by a foreign entity or of invalidating a guilty verdict rendered, or a sentence imposed, by a foreign entity. The verdict and the sentence, if any, are not subject to any appeal or other form of review in Canada.

Objet et principes

Objet
3 La présente loi a pour objet de renforcer la sécurité publique et de faciliter l'administration de la justice et la réadaptation et la réinsertion sociale des délinquants en permettant à ceux-ci de purger leur peine dans le pays dont ils sont citoyens ou nationaux.

Maintien en état de la situation juridique
5(1) Le transfèrement ne peut avoir pour effet de porter atteinte à la validité de la déclaration de culpabilité ou de la peine prononcées par l'entité étrangère, d'aggraver la peine ou de permettre que celle-ci ou la déclaration de culpabilité fassent l'objet d'un appel ou de toute autre forme de révision au Canada.

Continued enforcement and Adaptation

Continued enforcement
13 The enforcement of a Canadian offender's sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and their sentence imposed by a court in Canada.

Application continue et adaptation

Application continue
13 La peine imposée au délinquant canadien transféré continue de s'appliquer en conformité avec le droit canadien, comme si la condamnation et la peine avaient été prononcées au Canada.

Sentence Calculation

Application
29(1) Subject to this Act, a Canadian offender who is transferred to Canada is subject to the Corrections and Conditional Release Act, the Prisons and Reformatories Act and the Youth Criminal Justice Act as if they had been

Calcul des peines

Lois applicables
29(1) Sous réserve des autres dispositions de la présente loi, la Loi sur le système correctionnel et la mise en liberté sous condition, la Loi sur les prisons et les maisons de correction et la Loi sur le système de justice pénale pour les

convicted and their sentence imposed by a court in Canada.

Compassionate Measures

Canadian offender

30(1) A Canadian offender shall benefit from any compassionate measures — including a cancellation of their conviction or shortening of their sentence — taken by a foreign entity after the transfer.

adolescents s'appliquent au délinquant canadien transféré comme si la condamnation et la peine avaient été prononcées au Canada.

Mesures d'ordre humanitaire

Délinquant canadien

30(1) Le délinquant canadien transféré bénéficie de toute mesure d'ordre humanitaire — notamment l'atténuation de sa peine ou l'annulation de sa déclaration de culpabilité — prononcée par l'entité étrangère après le transfèrement.